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No. 99-1240

In The

SUPREME COURT OF THE UNITED STATES

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES, *Petitioners*,

v.

PATRICIA GARRETT AND MILTON ASH, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATORS DOLE, HARKIN, HATCH, JEFFORDS, AND KENNEDY, AND REPRESENTATIVES BARTLETT AND HOYER AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici,[1] Senators Robert Dole, Tom Harkin, Orrin Hatch, Jim Jeffords, and Edward Kennedy, and Representatives Steve Bartlett and Steny Hoyer, are five current and two former Members of Congress who played leadership roles in the development and passage of the Americans with Disabilities Act (ADA) from 1988 to 1990. Relevant biographical information regarding each of the *amici* is provided in the Appendix. The interest of the *amici* is to provide the Court with information regarding the concerns addressed by Congress through passage of the ADA.

SUMMARY OF ARGUMENT

During consideration of the ADA, Congress heard extensive evidence regarding the discrimination experienced by people with disabilities. Such discrimination arose from a series of factors: the discomfort that people without disabilities experienced when dealing with people with disabilities (either because of repulsion, fear, or embarrassment); the fact that disability was stigmatized and considered a negative characteristic; that fact that people with disabilities were subject to false stereotypes; the fact that people with disabilities were the object of patronization and pity; and the fact that societal decisions were often made as if people with disabilities were not part of our society.

The factors identified by Congress -- discomfort, stigma, false stereotyping, pity, and invisibility -- all stood in the way of individuals with disabilities receiving equal opportunities in jobs, services, and goods. The goal of the ADA, therefore, was to ensure that individuals with disabilities would be considered

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae*, its staff, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

on their merits and qualifications, and not on the basis of animus, fear, stereotype, or pity.

Discrimination against people with disabilities arising from the factors found by Congress is unconstitutional under the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Governments may enact classifications based on disability, without fear that such classifications will be second-guessed by the judiciary, as long as the classifications are adopted for some legitimate purpose. Governments may not, however, simply use disability as a proxy for decision-making without providing some rational justification. While this standard is not difficult to meet as long as government seeks to achieve some legitimate objective, government fails to meet even this standard if its use of disability as a proxy is based on discomfort, stigma, false stereotyping, or pity, rather than on reality and facts.

The testimony received by Congress indicated that employers, including state and local governmental managers, were using the fact of an individual's disability as a proxy for assuming that such individual would not be appropriate for employment. Use of disability in this manner was not a benign, rational means of achieving other legitimate governmental interests (such as hiring productive, qualified workers). Rather, such use of disability was based on feelings of discomfort with people with disabilities, or on unjustified, irrational concerns regarding people with disabilities' lack of productivity that was based on stereotypes or stigma, rather than on reality.

In response to these facts, Congress passed the ADA. The various employment provisions of the ADA were measures designed both to prevent and remedy the unconstitutional conduct observed by Congress. Moreover, these measures were

congruent and proportionate responses to the conduct observed by Congress.

Congress prophylactically precluded the possibility that disability would be used unconstitutionally as a proxy by mandating that employers engage in an individualized assessment of the qualifications of a person with a disability. The reasonable accommodation provision of the ADA likewise serves a prophylactic purpose by ensuring that employers may not use the pretext of cost to justify or mask otherwise unconstitutional conduct. Finally, the ADA's disparate impact requirement precludes the unjustified use of physical qualification standards, or unmodified job-related policies, that often masks, or operates in tandem with, prejudice, fear, stigma, and discomfort regarding people with disabilities.

A decision in this case that Congress acted within its authority when it abrogated States' sovereign immunity under the ADA will not open the floodgates for Congress to enact any law that abrogates States' sovereign immunity. To the contrary, it will stand for the simple proposition that -- in the case of the ADA -- Congress correctly took note of likely unconstitutional conduct on the part of the States and passed a congruent and proportional statute in response.

ARGUMENT

I. IN PASSING THE ADA, CONGRESS WAS MOTIVATED BY A DESIRE TO EFFECTUATE THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT AND NOT SOLELY BY "POLICY" CONSIDERATIONS.

Petitioners argue that Congress was motivated solely by "Article I policy concerns" in passing the ADA, and that a review of the text and legislative record of the ADA confirms

that Congress was not even "pretend[ing] to 'respond' to State action, to say nothing of unconstitutional State action." Pet. Br. at 31. Indeed, Petitioners argue, the legislative history does not reveal "any discussion of what the Constitution requires in this area or how the ADA is designed to meet those requirements." *Id.* at 36.

Petitioners mistakenly assume that the "policy" considerations motivating Congress to pass the ADA were entirely removed from Congress' desire to effectuate the equal protection guarantee of the Fourteenth Amendment. Moreover, Petitioners incorrectly assume that because Members of Congress did not explicitly characterize the conduct engaged in by State officials as unconstitutional, Congress was not seeking to effectuate the equal protection guarantee of the Fourteenth Amendment when it passed the ADA.

Based on extensive testimony gathered by Congress, several major policy considerations emerged to motivate passage of the ADA. These included the fact that non-disabled individuals often experienced discomfort around people with disabilities (either because of repulsion or fear or because of embarrassment in relating to people with disabilities); that disability was stigmatized and considered a negative characteristic; that people with disabilities were subjected to false stereotypes; that people with disabilities were the object of patronization and pity; and that societal decisions were often made as if people with disabilities were not part of our society.[2] Congress was made aware of the fact that such discomfort, stigma, false stereotyping, pity, and invisibility all stood in the

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[2] *See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 17-27 (1983).

way of individuals with disabilities receiving equal opportunities in jobs, services, and goods.[3]

The goal of the ADA, therefore, was to ensure that individuals with disabilities would be considered on their merits and qualifications, and not on the basis of animus, fear, stereotype, or pity. As far as Congress was concerned, these inappropriate and illegitimate views of people with disabilities, and the subsequent remedial purpose of the ADA, applied as equally to State officials as it did to private individuals.[4]

With these policy considerations in mind, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce" to pass the ADA. 42 U.S.C. § 12101(b)(4) (1998). Congress did not parse out the reach and boundaries of each of these separate powers. But its failure to do so cannot be taken as evidence that it did not intend to enforce the equal protection guarantee of the Fourteenth Amendment through passage of the ADA -- as Congress expressly noted it was doing.

Indeed, this brief will demonstrate that Congress *was* aware of a pattern of likely unconstitutional conduct on the part of the States, and that the ADA was a proportionate and congruent response to that pattern of conduct. Under current Supreme Court jurisprudence, of course, this Court must feel confident that Congress acted pursuant to such concerns in order to justify its abrogation of the States' sovereign immunity. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996)

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[3] *See, e.g.*, 136 CONG. REC. S9684 (daily ed. July 13, 1990) (statement of Sen. McCain); 136 CONG. REC. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole); 136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen. Harkin).

[4] *See infra* pp. 15-20.

(overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

At a minimum, however, this Court should not presume that such concerns did not exist merely because Congress did not include explicit headings, such as "Unconstitutional Conduct on the Part of States," that would now be appropriate. Rather, the "policy" considerations that Petitioners acknowledge motivated passage of the ADA, *see* Pet. Br. at 33-36, and which applied equally to State officials and to private individuals, formed precisely the basis for Congress' legitimate effectuation of the Fourteenth Amendment guarantee of equal protection under the law through passage of the ADA.

II. THERE WAS A SUFFICIENT PATTERN OF LIKELY UNCONSTITUTIONAL CONDUCT ON THE PART OF THE STATES TO WARRANT PASSAGE OF THE ADA UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

A. The Court's View of Unconstitutional Conduct Based on Disability is Consistent with the View Implemented by Congress in Passage of the ADA.

In *City of Boerne v. Flores*, the Court clarified for Congress that the legislature cannot "decree the substance of the Fourteenth Amendment's restrictions on the States . . . . [Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." 521 U.S. 507, 519 (1997). As the Court reaffirmed in *Kimel v. Florida Bd. of Regents*, "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." 120 S. Ct. 631, 644 (2000) (citing *City of Boerne*, 521 U.S. at 536).

Thus, to determine whether there was a pattern of unconstitutional conduct on the part of the States on the basis of disability prior to passage of the ADA, it is necessary to determine what this Court would have considered to be a violation of the Fourteenth Amendment with regard to disability. There was only one case that Congress had before it, prior to passage of the ADA, that spoke to that issue: *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).[5] Based on the Court's reasoning and holding in that case, Congress had reason to believe that States were engaging in a likely pattern of unconstitutional conduct on the basis of disability. Moreover, nothing in the Court's equal protection jurisprudence since that time has reflected a change in what would have been considered likely unconstitutional state conduct.[6]

In *Cleburne*, the Court concluded that a zoning ordinance was unconstitutional as applied to the denial of a special use permit for a group home that would house 13 mentally retarded individuals. Justice White, writing for the majority, noted that it was not appropriate, under separation of powers principles, to subject all governmental classifications using disability to heightened judicial scrutiny. As Justice White explained:

> The lesson of *Murgia* [, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976),] is that where individuals

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[5] In *Schweiker v. Wilson*, 450 U.S. 221 (1981), decided prior to the passage of the ADA, the Court concluded that a challenged provision of the Social Security Act did not classify individuals solely on the basis of mental illness and upheld the law as a rational allocation of federal resources. *Heller v. Doe*, 509 U.S. 312 (1993), another case applying rational basis review, was decided following passage of the ADA.

[6] In *Heller v. Doe*, the Court upheld Kentucky's different involuntary commitment procedures for people with mental illness and mental retardation as related to legitimate governmental objectives. 509 U.S. at 333.

> in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued . . . . [I]t is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world . . . . They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter . . . . Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation. 473 U.S. at 441-443 (footnote omitted).

While the Court recognized that many laws benefitting people with mental retardation would presumably withstand examination under a heightened scrutiny test, *see id.* at 444, it declined to apply that standard of review. As Justice White explained,

> Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all . . . . Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts. *Id.* at 444-445.

With regard to the actual governmental action in the case before it, the Court concluded that requiring a special use permit only for the group home of mentally retarded individuals (and not, for example, for lodging houses, fraternity houses, or nursing homes for the elderly) appeared to rest on "an irrational prejudice against the mentally retarded," and could not be justified under any of the rationales proffered by the local government. *Id.* at 449-450. As the Court explained:

> It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the [group home at issue] and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case. *Id.* at 448.[7]

Justice Marshall, joined by Justices Brennan and Blackmun, concurring in part and dissenting in part, noted that he agreed with the "holding and principle" of the majority, which he described as "the principle that mental retardation *per se* cannot be a proxy for depriving retarded people of their

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[7] Justice Stevens, joined by Chief Justice Burger, added a concurring opinion primarily to note that prior Supreme Court cases had not truly delineated "well-defined standards" of review, but rather had "reflect[ed] a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451 (1985).

rights and interests without regard to variations in individual ability." *Id.* at 455.[8]

The Court's opinion in *Cleburne* thus established for Congress the "interpretation and determination of the Fourteenth Amendment's substantive meaning" with regard to classifications based on disability. *Kimel,* 120 S. Ct. at 644. Under the Court's approach, federal, state, and local governments could enact classifications based on disability, without fear that such classifications would be second-guessed by the judiciary, as long as the classifications were adopted for some legitimate governmental purpose. Indeed, the Court in *Cleburne* had observed that "a civilized and decent society *expects* and *approves* such legislation [providing special treatment for people with mental retardation]," 473 U.S. at 444 (emphasis added), and specifically adopted a deferential standard of review toward such legislation to ensure that legislatures would not be chilled from adopting such laws. *Id.* Thus, as Congress saw it, prior to passage of the ADA, a number of state laws and practices that treated people with disabilities differently would be constitutional under the Fourteenth Amendment.

On the other hand, the Court's ruling in *Cleburne* made equally clear that federal, state, and local governments could not simply use mental retardation (or presumably, other disabilities) as a proxy for decision-making without providing some rational justification. For example, a government could not simply assert that "no blind people can be teachers," or "no

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[8] Justices Marshall, Brennan and Blackmun, nevertheless, dissented from "the way the Court reach[ed] its result" because they could not "accept the Court's disclaimer that no 'more exacting standard' than ordinary rational basis review" was being applied and because they believed the city's ordinance should have been invalidated on its face, rather than as applied. 473 U.S. at 456.

people with hearing impairments can live in low-income housing," without concern of constitutional violation. Such policies, which used disability as a proxy for qualifications, would be similar to the City of Cleburne's policy that "a group home for 13 people with mental retardation cannot locate in this zone without a special use permit." In such cases, the Equal Protection Clause, as interpreted by the Supreme Court, would require the government to justify its policy as having a rational basis.

This constitutional standard would not be a heavy burden for government to meet as long as it was seeking to achieve some legitimate governmental objective. But a government would find it difficult to meet even this standard if its use of disability as a proxy was based on discomfort, stigma, false stereotyping, or pity, rather than on reality and facts. Thus, for example, it would not be difficult for a government to justify a policy that "no blind people can be bus drivers." However, it would presumably be more difficult for a government to justify a policy that "no blind people can be teachers," just as it was difficult (and ultimately, impossible) for the City of Cleburne to justify its policy regarding people with mental retardation.

Based on the Court's jurisprudence, therefore, Congress would have viewed the practical results of the rational basis constitutional standard for disability as different from the practical results of the analogous standard for age. As the Court later explained in *Kimel*:

> Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. "Where rationality is the test, a State 'does not violate the Equal Protection

> Clause merely because the classifications made by its laws are imperfect." Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." 120 S. Ct. at 646 (citations omitted).

This practical application of the rational basis standard for age stands in stark contrast to the Court's analysis and holding in *Cleburne*, in which the City of Cleburne was not permitted to use mental retardation as a proxy for demanding a special use permit and, indeed, was required to affirmatively provide some rational justification for its use of mental retardation in that fashion. *See supra* pp. 7-11.

It makes sense, however, that classifications based on disability and on age would both receive rational basis review by the courts -- and yet that disability would not be permitted to be used as a proxy without some affirmative justification, while age would be permitted to be used in such a fashion for constitutional purposes. Because government may often need to legislate on the basis of disability, in the same manner in which it may need to legislate on the basis of age or other characteristics (and in a manner in which it would be rare, for example, for government to legislate on the basis of race or gender), the Court in *Cleburne* concluded that, under a separation of powers model, it was legitimate to restrict judicial review of classifications, based on either age or disability, to a rational basis standard. 473 U.S. at 441-443; *see also supra* pp. 7-11.

The fact that classifications based on disability and age both receive rational basis scrutiny does not, however, concomitantly mean that disability may be used as a proxy for qualifications in the same manner that age may. This is

because the essence of rational basis review is that a court will "'not overturn such [government action] unless the varying treatment of different groups or persons is *so unrelated* to the achievement of *any combination of legitimate purposes* that we can only conclude that the [government's] actions were irrational.'" *Kimel*, 120 S. Ct. at 646 (citation omitted) (emphasis added). In the case of age (and certainly in the case of most characteristics that receive rational basis review, ranging from home ownership to employment and family status),[9] there is usually no reason for a court to *presume* a government is using age (or the other characteristics) as a proxy for anything other than a legitimate government purpose.

The picture is quite different, however, for individuals with disabilities. Such individuals have been subject to a history of exclusion, discomfort, stigma, stereotyping, and pity. *See generally* DISABLED PEOPLE AS SECOND-CLASS CITIZENS (Myron G. Eisenberg et al. eds., 1982) (an account of the obstacles faced by people with disabilities); WITH THE POWER OF EACH BREATH (Susan E. Browne et al. eds., 1985) (an anthology of stories from women with disabilities). The reality and impact of such attitudes was captured well by Charles Crawford, Commissioner of the Massachusetts Commission for the Blind:

> For far too long and far too many centuries, disabled people have felt the pain of discrimination, of being held separate, at being looked at as different, as somehow being viewed as lesser . . . . I personally have felt the discrimination, the isolation, the sense of helplessness and the sense of no ability to relate to other people because they have shut me out. *Oversight Hearing on H.R. 4498,*

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[9] *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Dandridge v. Williams*, 397 U.S. 471 (1970).

Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. 27 (1988).

Given this history with regard to people with disabilities, one understands how the Court in *Cleburne* would not presume that, when government uses disability as a proxy, it is presumptively doing so because of some legitimate governmental purpose, rather than as a result of irrational prejudice.[10] Thus, as *Cleburne* established, when government uses disability as a proxy, it must proffer some rational reasons for such use; if those reasons are not persuasive, the government's action will be invalid under the Equal Protection Clause.[11]

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[10] Indeed, as Justice Stevens pointed out in his concurring opinion in *Cleburne*, the Court had to be "especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification . . . .'" 473 U.S. at 453 n.6 .

[11] The finding included by Congress in the ADA -- that people with disabilities have been "subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society," 42 U.S.C. § 12101(a)(7) (1998) -- thus reflects the fact that disability shares certain qualities with race and gender. This finding does not contest the basis on which the *Cleburne* majority adopted the standard of review for governmental classifications based on disability: that is, the ongoing need for government to enact affirmative legislation with regard to people with disabilities. *See* 473 U.S. at 446.

B. There was a Pattern of Likely Unconstitutional Conduct on the Part of State and Local Governments Prior to Passage of the ADA.

The first version of the ADA was introduced on April 28, 1988.[12] The final version of the ADA was passed on July 12 and 13, 1990 (by the House of Representatives and the Senate, respectively).[13] During the twenty-six months in which the ADA was under active consideration by Congress, eighteen hearings were held by seven different committees.[14] The voluminous testimony addressed the range of adverse actions and negative attitudes that people with disabilities faced every day of their lives.[15]

The testimony Congress received gave it reason to believe that it was necessary to extend anti-discrimination requirements to all state and local governments. That is, evidence of the type of discrimination faced by people with disabilities across the board gave Congress reason to believe that state and local officials were engaging in activities that were likely unconstitutional under *Cleburne* and that required the intervention of passage of the ADA.

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[12] S. 2345, 100th Cong. (1988); H.R. 4498, 100th Cong. (1988).

[13] 136 CONG. REC. H4629-30 (daily ed. July 12, 1990); 136 CONG. REC. S9695 (daily ed. July 13, 1990).

[14] *See* STAFF OF HOUSE COMM. ON EDUC. AND LABOR, 101ST CONG., 2D SESS., LEGISLATIVE HISTORY OF PUB. L. NO. 101-336: THE AMERICANS WITH DISABILITIES ACT (Comm. Print 1990); *Americans with Disabilities Act of 1989: Hearings Before the Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. (1989).

[15] *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 418-420 (1991) (providing examples from ADA testimony).

While Congress considered evidence regarding discrimination in a range of areas, the information regarding employment is most relevant to the case now before the Court. In a report relied upon by Congress, the United States Commission on Civil Rights documented the great disparity in unemployment rates between those with disabilities and those without. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 28 (1983). Further study indicated that in only a tiny fraction of the cases was this due to the inability of the person to perform his or her job. More often it was due to the prejudices and assumptions of the employer. Indeed, when given the chance, even individuals with severe disabilities have been found to have "excellent" work records. *Id.* at 30 (citing UNITED STATES CIVIL SERVICE COMMISSION, A CHAIN OF COOPERATION: SEVERELY PHYSICALLY DISABLED EMPLOYEES IN FEDERAL SERVICE 3 (1976)).

This discrimination extended beyond merely gaining employment. The Commission on Civil Rights' report documented that individuals with disabilities were more likely to work part-time (in spite of their ability to work a normal 40-hour week) and, at every educational level, earned less than their non-disabled coworkers. *Id.* at 31.[16] And again, these disparities could not be explained through differences in productivity. Studies dating back to the 1940s have consistently shown that, when placed in appropriate positions,

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[16] While this difference was largest among the lowest educational groups and among women (who sometimes earned only half of what the poorly-educated non-disabled did), it held true for every sex, educational, and racial grouping. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 31-32 (1983) (citing Barbara Wolfe, *How the Disabled Fare in the Labor Market*, MONTHLY LAB. REV., Sept. 1980, at 51.).

individuals with disabilities are as productive, if not more so, than their non-disabled counterparts. *Id.* at 32.

In the many hearings it held on the ADA, Congress heard much of this evidence firsthand. For instance, it heard how a woman with controlled epilepsy was denied a job in Massachusetts because, although she was the most qualified candidate, the program director thought her seizures "would get in the way," *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 140 (1988) (statement of Sara Bloor), how a teacher was denied an elementary school credential because of paralysis in her legs, *see* S. REP. NO. 101-116, at 7 (1989), H.R. REP. NO. 101-485, pt. 2, at 29 (1990), and how a woman "'crippled by arthritis' was denied a job, not because she could not do the work but because 'college trustees [thought] normal students shouldn't see her.'" S. REP. NO. 101-116, at 7 (1989), H.R. REP. NO. 101-485, pt. 2, at 30 (1990). Clearly, in the employment sector, individuals with disabilities were being judged not on their merits, but on superficial appraisals of their productivity stemming from negative attitudes and stereotypes.

Congress was given no reason to believe that state and local managers who made employment decisions were immune from these general employer practices of inappropriately using disability as a proxy. Indeed, it would have been difficult to imagine why such managers, who are part of the same overall fabric of society as other employers, would have had radically different views of the qualifications of people with disabilities.[17]

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[17] The only possible reason might have been that, as representatives of government (albeit in their capacity as employers), such individuals might have felt more of a responsibility to treat people with disabilities based on their merits, rather than based on irrational stereotypes. In addition, the fact

The testimony Congress received indicated that state and local managers were not, in fact, acting any differently from their private sector counterparts. In 1989, Congress received a study entitled DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL. This report was the result of the first area selected for study by the Advisory Commission on Intergovernmental Relations (ACIR). ACIR, DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL iv (A-111, April 1989). A majority of the Commission's members were State and local officials. *Id.* at i.

The ACIR report concluded that both the federal government and state governments needed to improve their activities with regard to individuals with disabilities. In the area of employment, the report noted a relatively low percentage of people with disabilities employed by either state or federal agencies. *Id.* at 60-64. With regard to state employment, the report also surveyed officials in state agencies concerned with disability policy and services, and representatives of state-level advocacy groups, regarding impediments to employment. *Id.* at 70. Negative attitudes or misconceptions regarding people with disabilities were rated by 48% of the state government officials as a moderate impediment and by 35% as a strong impediment, while 37% of representatives of state advocacy groups rated these factors as a moderate impediment and 48% rated them as a strong impediment. *Id.* at 72, Table 6-10. Thus, 80-85% of both

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that many States had laws prohibiting discrimination in government employment based on disability might also have helped in that regard. Based on the evidence, however, neither of these reasons resulted in a significant change on the part of state and local managers. *See infra* pp. 18-20.

groups reported that negative attitudes were moderate to strong impediments to employment for people with disabilities.

The survey also included an open-ended question, in which respondents were asked to identify factors that made state compliance with existing employment mandates difficult. The Report concluded:

> State advocates and public officials expressed common themes in their open-ended remarks. Both reiterated the significant and often negative impact of public and employer attitudes towards people with disabilities. Such attitudes have multiple dimensions, including feelings of discomfort in associating with disabled individuals, inaccurate assessments of their productivity, and concerns about the cost that might be associated with workplace accommodations.
>
> Both groups expressed strong distress at the prominence of these attitudes and the difficulty in changing them. Negative attitudes persist, despite evidence that handicapped workers are productive, countless experiences with persons with disabilities who have made successful adjustments to work settings, and studies showing that most workplace accommodations involve little cost. *Id.* at 73.

Thus, from 1988 to 1990, Congress observed the following facts regarding the employment situation for people with disabilities. Employers, including state and local governmental managers, were using the fact of an individual's disability as a proxy for assuming that such individual would not be appropriate for employment. Use of disability in this manner as a proxy was not a benign, rational means of achieving other legitimate governmental interests (such as hiring productive, qualified workers). Rather, use of disability as a proxy in this

manner was based either on feelings of discomfort with people with disabilities, or on unjustified, irrational concerns regarding people with disabilities' lack of productivity that were based on stereotypes or stigma, rather than on reality.

In response to these facts, Congress passed the ADA. Given the evidence of continued irrational discrimination before Congress, it clearly was not sufficient that most States currently had laws prohibiting employment discrimination on the basis of disability, nor that the federal government also currently prohibited such discrimination in state programs that received federal funds. (Indeed, the ACIR report had been designed specifically to judge state and federal compliance with such mandates. *See id.* at iv.) The problem of state employment managers using disability inappropriately as a proxy gave Congress ample cause to believe that further action was necessary to effectuate the equal protection guarantee of the Fourteenth Amendment.

III. THE ADA WAS A CONGRUENT AND PROPORTIONATE RESPONSE TO LIKELY UNCONSTITUTIONAL STATE CONDUCT.

A. The ADA's Individualized Assessment and Burden of Proof Requirements are an Appropriate Response to Unconstitutional State Conduct

Petitioners point out that "the ADA requires individualized case-by-case determinations as to whether a disabled employee is qualified for the job . . . not 'generalizations' based on physical and mental capacity," that "the ADA places the burden of proof on States to justify their conduct . . . not the claimant," that "the ADA presumptively bars consideration of disability in providing public services or in employing civil servants," and that "the ADA requires an objective justification in a court of law." Pet. Br. at 42-43 (items 1-3 and 8) (citations omitted).

According to Petitioners, each of these requirements "contrasts with constitutional litigation at every turn." *Id.* at 42.

Petitioners are correct that the ADA requires that state employers engage in an individualized assessment of the qualifications of a person with a disability, rather than rely on broad generalizations. They are also correct that if an employer acknowledges it has used disability as a proxy for employment decisionmaking, the employer must provide some rational reason for that choice.

In many cases, under the ADA, the employer will prevail: for example, an employer could rationally choose to use blindness as a proxy for disqualification as a bus driver. In other cases, the employer will probably not prevail: for example, an employer could not use blindness as a proxy for disqualification to be a teacher without proffering some rational reason that was not based on a stereotype or not based on a lack of understanding of the capacity of blind people.

These requirements of the ADA, however, are appropriate mechanisms to ensure that state employees do not engage in unconstitutional behavior. State employers are constitutionally precluded, even under a rational basis standard of review, from simply adopting disability as a proxy for qualification without proffering some rational reason. *See Cleburne*, 473 U.S. at 446. It is, thus, legitimate for Congress to prophylactically preclude the possibility that disability will be inappropriately used as a proxy by mandating that employers engage in an individualized assessment of the qualifications of a person with a disability. Such a requirement ensures that qualification decisions will be based on merit and not on stereotypes and biases and, therefore, is a logical, congruent, and proportionate requirement to the constitutional prohibition that already applies to state employers.

It is also legitimate for Congress to place the burden on the employer to proffer a rational reason for taking an adverse employment action against an otherwise qualified person with a disability, once the person with the disability establishes a prima facie case that he or she is qualified and that disability was a motivating factor in the action. In such cases, the employer might demonstrate that disability was not the motivating factor in the employment action, or might demonstrate that the adverse action was rational -- that is, that the person's disability disqualified the individual from the job. In either case, however, placing some requirements on the employer is a legitimate prophylactic mechanism to ensure that disability is not inappropriately used as a proxy in employment decisions.

B. The ADA's Requirement of Reasonable Accommodations is an Appropriate Response to Unconstitutional State Conduct

Petitioners point out that "the ADA compels States to provide 'reasonable accommodation' for disabled employees unless it 'impose[s] an undue hardship,'" and that "the ADA compels States to make 'reasonable modifications' in their public services to accommodate the disabled unless they would 'fundamentally alter' the nature of the program." Pet. Br. at 42-43 (items 5-6) (citations omitted). Again, Petitioners assert that each of these requirements "contrasts with constitutional litigation at every turn." *Id.* at 42.

Petitioners do not explain, in any detail, why the reasonable accommodation requirements of the ADA are so far removed from constitutional obligations. Rather, they simply preface their list of ADA obligations with the assertion: "The rigorous standard of review applicable to an ADA action has no

parallel to the forgiving standard that the Court applies to equal protection claims." *Id.* at 41.[18]

In fact, the reasonable accommodation requirement of the ADA serves both a prophylactic and a remedial purpose that is congruent and proportionate to the underlying constitutional obligation. Under the Constitution, a state employer cannot use disability as a proxy for qualification without proffering some rational reason. One "rational" reason an employer may proffer is that employing people with disabilities will be too costly. For example, a state employer may attempt to justify its rule that "no blind people may be teachers" on the assertion that it will cost too much to provide readers for such individuals.

In reality, however, the employer may simply be using the cost concern as a pretext for not hiring individuals with whom the employer is uncomfortable or with regard to whom the employer simply feels, on a "gut level," are not qualified.[19] Establishing a legal reasonable accommodation requirement thus serves a pivotal prophylactic purpose. Once an employer must engage in a good-faith dialogue with a blind applicant or employee to determine what accommodations are actually necessary and what they actually cost (for example, the advent of new technology may obviate the need for readers and be cost-effective), the employer is precluded from using cost as a simple pretextual reason to justify the use of disability as a proxy.

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[18] Earlier in the brief, Petitioners also assert: "These disparate-effect and reasonable-accommodation requirements [of the ADA] far exceed the minimal strictures of rational-basis review." Pet. Br. at 29. There is no detailed analysis, however, as to why a reasonable accommodation requirement is so far removed from the equal protection guarantee of the Fourteenth Amendment.

[19] *See, e.g.*, S. REP. NO. 101-116, at 10 (1989) (costs of accommodation are frequently exaggerated); H.R. REP. NO. 101-485, pt. 2, at 34 (1990) (same).

Nor is the ultimate burden on state employers incongruent with their constitutional obligations, given the "undue hardship" limitation in the law. 42 U.S.C. § 12112(b)(5)(A) (1998). There may well be situations where the cost of accommodating an employee will be quite significant, in light of the resources available to the employer. But it is precisely in those situations that the ADA provides the employer a defense to the reasonable accommodation obligation. *See id.*

Requiring reasonable accommodations is also a congruent and proportionate remedial measure. Numerous studies have demonstrated that an effective means of reducing attitudes of discomfort, stigma, false stereotypes, and pity regarding people with disabilities is to enhance the interaction between people with disabilities and people without disabilities.[20] Indeed, the very reason many myths and stereotypes exist regarding the incapacity of people with disabilities to work is because people with disabilities have been prevented from demonstrating their true capacity in the employment arena.[21]

But interaction in the workplace is difficult to ensure without some remedial actions. The reality is that societal decisions have been made as if people with disabilities were not part of our societal makeup. Thus, we have built buildings with steps, rather than ramps; we have manufactured telephones without built-in amplifiers; and we have created work schedules and rules that do not accommodate people with

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[20] *See, e.g.*, Myron G. Eisenberg, *Disability as Stigma*, DISABLED PEOPLE AS SECOND-CLASS CITIZENS 3 (Myron G. Eisenberg et al. eds., 1982); C. R. Schneider & W. Anderson, *Attitudes Toward the Stigmatized: Some Insights from Recent Research*, 23 REHABILITATION COUNSELING BULL. 299, 300 (1980); H. Hahn, *Paternalism and Public Policy*, SOC. SCI. & MOD. SOC'Y, Mar./Apr. 1983, at 46.

[21] *See, e.g.*, J. Gliedman & W. Roth, *Handicap as a Social Construction*, in THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA 22 (1980).

significant medical problems. Each of these decisions, and hundreds of other minor and major societal decisions, have operated to foreclose employment and social opportunities for people with disabilities.

It is impracticable to assume that people with disabilities can become integrated into the mainstream of American society if the barriers that society has erected against such participation are not obviated through some affirmative modifications. The reasonable accommodation requirement of the ADA thus serves a pivotal remedial function. In order to break down the discomfort, stigma, stereotypes, and pity that have given rise to the unconstitutional actions of irrationally using disability in the first place, it is legitimate for Congress to mandate those remedial actions (subject to the "undue hardship" and "undue burden" limitations[22]) that can assist in the integration of people with disabilities into American society.

C. The ADA's Disparate Impact Requirement, Which is Best Understood as a Qualification Standard or a Reasonable Accommodations Requirement, is an Appropriate Response to Unconstitutional State Conduct

Petitioners note that the ADA "prohibits any rule or practice that has a disparate impact unless the State can prove that it is 'job-related' and 'consistent with business necessity,'" that "employment standards amount to impermissible conduct if they 'have the effect of discrimination' or 'tend to screen out' disabled individuals," and that "the ADA frequently requires proof that there is no acceptable alternative with less discriminatory impact." Pet. Br. at 42-43 (items 3, 7, and 9) (citations omitted). Again, Petitioners assert that each of these

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[22] 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(2)(A)(iii) (1998).

requirements "contrasts with constitutional litigation at every turn." *Id.* at 42.

Petitioners are, of course, correct that neutral governmental actions that have the effect of discrimination are not directly prohibited by the Constitution. *See Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). But the specific actions prohibited by the ADA are appropriate prophylactic and remedial mechanisms to ensure that governmental actions based on irrational prejudice, which *are* prohibited by the Constitution, are prevented or remedied.

In practice, most "disparate impact" claims under the ADA are applications of either the qualifications standard requirement of the ADA, 42 U.S.C. § 12113(a), or the reasonable accommodation requirement, § 12112(b)(5)(A). Disparate impact cases under Title VII of the Civil Rights Act of 1964 often contest neutral rules, such as educational requirements or height or strength requirements, that do not target race or gender in any manifest manner, but nonetheless have a disproportionate effect on a particular race or gender. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490 (C.D. Cal. 1971). By contrast, in ADA cases, the "neutral rule" is often a qualification standard, such as a strength or endurance requirement, that disqualifies some people with disabilities in a very straightforward manner. *See, e.g., Hunter v. Pennsylvania Dep't of Corrections*, 42 F. Supp.2d 542 (E.D. Pa. 1999).

The ADA does not preclude employers from having such qualification standards. Indeed, many jobs rationally require physical standards. Rather, the ADA requires that the qualification standard be "job-related and consistent with business necessity"-- that is, that the physical standard actually be rationally related to the job. 42 U.S.C. § 12113(a) (1998).

In some cases, the challenge to the neutral rule takes the form of a reasonable accommodation request. An employer may have a job-related requirement that applies to everyone, but which makes it impossible for even an otherwise *qualified* individual to perform the job. For example, a state may have a requirement that all applicants for teaching jobs must take a written test. A blind individual, who is otherwise qualified to be a teacher, would be precluded by this job-related "neutral policy" from becoming a teacher.

Under the ADA, the employer can continue to have a job-related neutral policy that applies to all applicants and employees. However, the employer also must ensure that a modification is made to the neutral policy if doing so would allow a person with a disability to obtain or perform a job. The employer need not, however, make any modification that would fundamentally alter the nature of the job or would otherwise constitute an undue hardship. *See* 42 U.S.C. § 12112(b)(5)(A) (1998).

Congress understood that neutral rules -- either in the form of physical qualification standards or in the form of job-related policies -- often masked, or operated in tandem with, prejudices, fear, stigma, and discomfort that characterized employer attitudes towards people with disabilities. As the Senate Committee Report to the ADA explained:

> [T]he ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job . . . . As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons

> with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity.
>
> *The three pivotal provisions* to assure a fit between job criteria and an applicant's actual ability to do the job are:
>
> (1) The requirement that persons with disabilities not be disqualified because of the inability to perform non-essential or marginal functions of the job;
>
> (2) The requirement that any selection criteria that screen out or tend to screen out be job-related and consistent with business necessity; and
>
> (3) The requirement to provide resonable [sic] accommodation to assist persons with disabilities to meet legitimate criteria.
>
> These three legal requirements, which are incorporated in sections 102(b)(5) and (7) of the legislation, *work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process*. S. REP. NO. 101-116, at 37 (1989) (emphasis added).

Obviously, not every physical qualification standard or job-related neutral policy is adopted by an employer to mask, or to work in tandem with, unconstitutional conduct on the part of the employer. But based on the evidence found by Congress, and recorded in the testimony and committee reports, there was, and there continues to be, a "pervasive bias" against employing people with disabilities that contravenes constitutional obligations. *Id.* In light of such a record, Congress could legitimately adopt the prophylactic and remedial mechanism of requiring that physical qualification standards be justified, and that reasonable accommodations be

made to job-related neutral policies, in order to both prevent and remedy such unconstitutional conduct.

IV. UPHOLDING CONGRESSIONAL POWER TO ENACT THE ADA IS CONSISTENT WITH THE COURT'S RECENT DECISIONS AND WILL NOT THREATEN PRINCIPLES OF FEDERALISM.

Petitioners observe that "a decision upholding the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, with no widespread practice of relevant constitutional violations to boot, would break new ground and do little 'to allay lingering concerns about the extent of national power.'" Pet. Br. at 47 (citing *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). Petitioners argue:

> Such authority simply has no stopping point. Virtually any Federal law that is itself rational could fairly be said to curb the risk of irrational State lawmaking in the area . . . Many questions linger here, and the answers to all of them counsel against accepting the invitation to start down this precipitous path. Pet. Br. at 47-48

As Petitioners' statement indicates, however, there is a natural stopping point to Congress' power. A decision to uphold the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, "*with no widespread practice of relevant constitutional violations to boot*," Pet. Br. at 47 (emphasis added), would certainly be breaking new ground. Indeed, it would constitute a reversal of several recent Supreme Court decisions. *See, e.g., Kimel*, 120 S. Ct. 631; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne*, 521 U.S. 507 (1997).

But *amici's* argument is premised on the fact that the ADA was passed against the backdrop of a "widespread practice of relevant constitutional violations" on the part of state actors. Pet. Br. at 47. Under the Court's equal protection jurisprudence with regard to disability, Congress had substantial evidence that state and local actors were likely engaging in unconstitutional conduct and that the ADA was a congruent and proportionate response to that conduct. *See supra* pp. 6-30.

Based on the Court's recent decisions, the Court itself holds and guides the reins that restrain Congress' power. Because the States' sovereign immunity may be abrogated only when Congress acts pursuant to section 5 of the Fourteenth Amendment, *see Seminole Tribe*, 517 U.S. 44,[23] and because Congress may not legislate far afield from the contours of the Fourteenth Amendment as established by the Supreme Court, *see City of Boerne*, 521 U.S. 507, a natural stopping point to Congress' power has been established by the Court.

A decision in this case that Congress acted within its authority when it abrogated States' sovereign immunity under the ADA would not open the floodgates for Congress to enact any law that abrogates States' sovereign immunity. To the contrary, it will stand for the simple proposition that -- in the case of the ADA -- Congress correctly took note of likely unconstitutional conduct on the part of the States, and passed a congruent and proportional statute in response.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

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[23] States may also consent to conditions when they accept federal funds, *see, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987), but such a waiver of sovereign immunity is not at issue in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

BIOGRAPHIES OF *AMICI CURIAE*

Senator Robert Dole served as the Republican Senator from Kansas from 1969 to 1996. During that time, he served as the Majority and Minority Leader in the Senate and was an original co-sponsor of the ADA. Senator Dole was a leader in the negotiations that led to the passage of the ADA.

Senator Tom Harkin is the Democratic Senator from Iowa and has served in the Senate since 1985. Senator Harkin was the chief sponsor of the ADA in the Senate and chair of the former Disability Policy Subcommittee of the Senate Labor and Human Resources Committee. In these roles, Senator Harkin was a leader in the negotiations that resulted in the ADA's passage.

Senator Orrin Hatch has served as the Republican Senator from Utah since 1977 and was ranking minority member of the Senate Committee on Labor and Human Resources from 1987 to 1992. Senator Hatch was a principal in the negotiations concerning the ADA.

Senator Jim Jeffords is the Republican Senator from Vermont and the chairman of the Senate Health, Education, Labor and Pensions Committee. In 1988, while serving as ranking member of the House Education and Labor Committee, Congressman Jeffords helped introduce the first version of the ADA. When he moved to the Senate in 1989, Jeffords became an original co-sponsor of the second version of the ADA and worked towards its passage.

Senator Edward Kennedy is the senior Democratic Senator from Massachusetts and has served in the Senate since 1963. From 1987 to 1994, Senator Kennedy chaired the Senate Labor and Human Resources Committee. In 1989, Senator Kennedy, together with Senator Tom Harkin and 32 other Senators introduced the second version of the ADA. Since 1995, Senator Kennedy has been the ranking minority member of the Health, Education, Labor, and Pensions Committee. Senator Kennedy was actively involved in the negotiations and compromises that resulted in passage of the ADA.

Congressman Steve Bartlett was the Republican Representative from the 3rd district of Texas from 1983 to 1991. From 1989 to 1990, Congressman Bartlett was the ranking minority member on the Subcommittee on Select Education of the House Education and Labor Committee. Congressman Bartlett was an original co-sponsor of the ADA and in the Fall of 1989, at the request of the Republican House leadership, Congressman Bartlett was active in negotiations on the ADA that resulted in its passage by the House Education and Labor Committee and, ultimately, by Congress.

Congressman Steny Hoyer is the Democratic Representative from the 5th district of Maryland. Congressman Hoyer was chairman of the House Democratic Caucus from 1989 to 1994. From 1989 to 1990, Congressman Hoyer led or participated in negotiations on the ADA on behalf of the Democratic House leadership as the bill passed through four House committees.